2007

B.A.M. Development, LLC., v. Salt Lake County : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

B.A.M. DEVELOPMENT, L.L.C., a Utah limited liability company, Plaintiff-Appellant vs SALT LAKE COUNTY, a body politic and a political subdivision of the State of Utah, Defendant-Appellee	)	[ORAL ARGUMENT REQUESTED] [Argument Priority 15] Appellate Case No. 20070137CA

APPELLANT'S REPLY BRIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY

The Honorable Timothy R Hanson, District Judge

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ORAL ARGUMENT AND PUBLISHED DECISION REQUESTED

IN THE UTAH COURT OF APPEALS

B.A.M. DEVELOPMENT, L.L.C., a Utah limited liability company, Plaintiff vs SALT LAKE COUNTY, a Utah body politic and political subdivision of the State of Utah, Defendant	APPELLANT'S REPLY BRIEF Docket No. 20070137-CA [Argument priority 15]

The Plaintiff-Appellant B.A.M. DEVELOPMENT, L.L.C. submits the following as its APPELLANT'S REPLY BRIEF.

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I

THE TRIAL COURT'S FAILURE TO CORRECTLY APPLY THE NOLLAN-DOLAN STANDARD IS NOT AN "ISSUE OF FACT" ENTITLED TO DEFERENTIAL REVIEW ON APPEAL

In its brief the COUNTY advances the novel---but nevertheless legally-incorrect---assertion that the District Court's analysis, rulings and conclusions regarding the "rough proportionality" issue---which is essentially THE core issue in this case---are an "issue of fact" entitled to a deferential standard of review. Such is absolutely incorrect. Although the "rough proportionality" question does require some "factual" issues (as do most litigated cases), the correct application thereof to the material facts is an "issue of law" and for which the Court of Appeals should review without any particular deference or presumption that the District Court "did it right".

The trial court's conclusions of law in civil cases are reviewed for correctness. **Society of Separationists, Inc. vs Taggart**, 862 P.2d 1339, 1341 (Utah Supreme Court 1993). This standard of review has also been referred to as a "correction of error standard". **Jacobsen Investment Company vs State Tax Commission**, 839 P.2d 789, 790 (Utah Supreme Court 1992); **Sanders vs Ovard**, 838 P.2d 1134, 1135 (Utah Supreme Court 1992). "Correction of error" means that no

particular deference is given to the trial court's ruling on questions of law. **State vs Pena**, 869 P.2d 932, 936 (Utah Supreme Court 1994); **Provo River Water Users' Association vs Morgan**, 857 P.2d 927, 931 (Utah Supreme Court 1993). The "correction of error" standard means that the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law. **State vs Deli**, 861 P.2d 431, 433 (Utah Supreme Court 1993); **Howell vs Howell**, 806 P.2d 1209, 1211 (Utah Court of Appeals 1993).

II

THE UNCONSTITUTIONALITY OF THE COUNTY'S "HIGHWAY-ABUTTING" ORDINANCE AND ITS APPLICATION TO B.A.M. IS READILY APPARENT

It does not take a "rocket scientist" to readily observe and conclude that the unconstitutionality of the COUNTY's so-called "highway-abutting" Ordinance---requiring, as a condition of issuance of governmental permission for development approval (ala subdivision development and/or building permit issuance) the uncompensated dedication of roadway AND the required installation of adjacent improvements---is apparent: for "Takings Clause" reasons and for obvious "equal protection" reasons. [One need merely pay close attention to the COUNTY's oft-repeated phrasing that the exactions (dedication and improvements installation) are required against "highway-abutting" property owners (such as

B.A.M. and "similarly-situated" persons). Unstated, but nevertheless carefully concealed in the COUNTY's statement, is the simple fact that other parcels, which create the same "impact" upon the roadway, are all exempt from any and all "exaction" requirement. Those "non-abutting" parcels are under no "development restriction".

Thus, the COUNTY's "highway-abutting" Ordinance, and the exactions derived thereunder, suffer from the unconstitutional "takings" issue first identified in the **Nollan** case in 1987, wherein the United States Supreme Court wrote:

> We view **the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it more than an exercise in cleverness and imagination.** As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a "substantial advancing" of a legitimate State interest. We are inclined to be particularly careful about the objective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is **a heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.**

107 SCt at 3150-51. Emphasis added.

It is patently obvious that the COUNTY's "highway-abutting" Ordinance clearly presents the "heightened risk" that its purpose is the "avoidance of the compensation requirement". Indeed, when coupled with the simple fact that

other "similarly-situated" parcels (in terms of roadway traffic "impact", not "highway-abutting" status) are not required to sustain any exaction, that conclusion---i.e. "avoidance of the compensation requirement"---is inescapable. The "avoidance of the compensation requirement (of the Just Compensation Clause)" does not "advance a **legitimate** governmental interest".

The COUNTY's failure to acknowledge and obey the constitutional requirement (clearly a matter of law since 1987 after **Nolan** was announced) was evident all through the initial trial and even on appeal. For example, the COUNTY has stated

> **The exaction in this case then, is not** an "ad hoc" discretionary assessment imposed on an individualized basis at the whim of some bureaucrat, or **based upon unique impact factors attributable exclusively to BAM's particular development.**

REPLY BRIEF OF PETITIONER AND CROSS-RESPONDENT SALT LAKE COUNTY ON WRIT OF CERTIORARI [2004], page 6. Emphasis added.

One need merely examine the trial court's "findings" and "conclusions", including the actual assertions, the nuances thereof, and the apparent logical progression reflecting the COUNTY's thinking on the subject---to ascertain what really happened in 1998. COUNTY Traffic Engineer Pullos, confronted with B.A.M.'s request for development approval, merely called up UDOT and Wasatch

Front Regional Council and asked the simple question, in essence: "What do you think the roadway width should be? What do you want it to be?"[1]

Although B.A.M. believes **Dolan** actually requires a "pre-Taking" analysis of "individualized determination" (and although the COUNTY asserts otherwise (namely, that a "post-Taking" determination is allowed), in this case the distinction is immaterial, for the simple fact that the determination advanced by the COUNTY simply doesn't work, pre-taking or post-taking.

III

COUNTY'S NEWLY-IDENTIFIED METHODOLOGY, ADVANCED FOR THE FIRST TIME ON APPEAL, SHOULD NOT BE CONSIDERED

Faced with the untenable legal and mathematical position assailed in B.A.M.'s opening BRIEF, the COUNTY seemingly abandons that position (and analysis) and now, for the first time (on appeal), seeks an alternative justification as to the correctness of the mathematical

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[1]Such a simplistic approach is consistent with her testimony, as well as the documentary evidence produced before the original trial in the District Court. This issue, however, is not herein raised to establish the COUNTY's failure to effect **Dolan**'s "burden of proof" requirements; rather, the identification of this issue is to point out the consistency of the COUNTY's "findings" as reflecting the actual presentation of the evidence to the District Court. That same procedural approach is arguably following in the COUNTY's recitation of the historical facts, as contained in its BRIEF.

derivation/justification of the "rough proportionality" exaction against B.A.M. This apparent abandonment implicitly acknowledges the correctness of B.A.M. original assertions: that the COUNTY's and the District Court's methodology in apply **Dolan** were incorrect.

But it is now "too late" for the COUNTY to re-enter a different horse in the race or to "change bets" at the conclusion of the race. The District Court has entered its "findings" and "conclusions", and the COUNTY is essentially bound by the entered "findings" and "conclusions". The COUNTY cannot now---for the first time on appeal---claim that "Judge Hansen might have ruled this way, for this reason". The simple fact is that Judge Hansen wasn't presented with that issue, and he didn't rule that way. So to say or infer otherwise is inappropriate.

The COUNTY's newly identified assertion---i.e. "rough proportionality" of the exaction imposed upon B.A.M. can be determined by the length of the traffic link roadway [7200 West to 8400 West: approximately 7900 feet]---contradicts long-established, "black letter" law that an issue first raised on appeal will not be considered. See **Holmstrom vs C R England, Inc.**, 2000 UT App 239, 8 P.3d 281 (Utah Court of Appeals 2000) [before a party may advance an issue on appeal, the record must clearly show that it was timely

presented to the trial court in a manner sufficient to obtain a ruling thereon], **Salt Lake County vs Calston**, 776 P.d 653 (Utah Court of Appeals 1989) [issues presented for first time on appeal are deemed waived, precluding Court of Appeals from considering their merits on appeal], Buehner Block Co vs UWC Associates, 752 P.2d 892 (Utah Supreme Court 1988) [record must clearly show the issue was timely presented to trial court in manner sufficient to obtain ruling thereon], and **Olson vs Park-Craig-Olson, Inc**, 815 P.2d 1356 (Utah Court of Appeals 1991) [appellate court may weigh only those facts and legal arguments preserved in trial court record].

That the COUNTY's newly-identified justification was not presented to the trial court is implicitly acknowledged not only by the lack of any written "finding" to that specific issue, but also the issue directly contradicts the District Court's expressed "findings" and the "conclusions", particularly "conclusion of law #5" which is the essential "core" of the District Court's resolution of the problem. In this context, the Court of Appeals must remember that the COUNTY could have presented any theory, or even multiple theories, to the trial court, for "finding" and/or "conclusion", if such were in the record.

The newly-advanced issue was not litigated, there was

no significant evidence presented on the issue (although there was brief evidence presented only as to the length of the roadway "link" (i.e. approximately one and one-half miles), but not more. There was absolutely no evidence adduced at trial as to the "value" of the existing improvement" [see **Banberry Development Corporation vs South Jordan City**, 631 P.2d 899 (Utah Supreme Court 1981)] as is otherwise required to satisfy the "constitutional standard of reasonableness".

Not only is the Record devoid of any such "value" evidence, the newly-derived arithmetic calculations by the COUNTY contain the following conceptual flaws:

1. By focusing merely upon the real estate "dedication", the methodology continues to ignore and overlook B.A.M.'s claim for $200,000+ of out-of-pocket expenses associated with the roadway improvements (curb, gutter, sidewalk, and so forth) it was required to install, benefitting the public-at-large and from which B.A.M. achieved no individualized benefit, except as members of the public-at-large.

2. Had the newly-identified issue been litigated, the truthful evidence would have been that the 3500 South roadway for the "link" is simply not

"wide open" (undersigned's terminology) to the full 106-foot right-of-way width (as the COUNTY's mathematical methodology implies), but is rather a roadway of varying widths, at many places significantly more narrow (sometimes as narrow as a single traffic lane each direction) and adjacent to already developed adjacent properties. Thus, when the roadway is fully improved (ostensibly by UDOT at some futuristic time), UDOT will have to pay significant amounts to acquire the necessary "right-of-way", which the COUNTY knows is not presently there. That the COUNTY implicitly incorporates that right-of-way into its mathematical fraction (as the denominator) is erroneous.

IV

PRESERVATION OF ISSUES FOR APPEAL

This entire case---in the District Court originally, "on appeal" to both appellate courts, and following the Supreme Court's "remand" to the District Court---centers on the "constitutional" issues raised in the original pleading [RECORD, page 1] and concluding with the District Court's "Memorandum Decision" [RECORD of "remand proceeding" October 2006, page 247-253], impliedly if not facially acknowledging

that the "rough proportionality" issue was presented to the District Court for adjudication.

The Plaintiff's arguments and position vis-a-vis the constitutional claims asserted within this appeal are more than adequately identified and addressed within the PLAINTIFF'S TRIAL BRIEF (April 2001) [RECORD at 75-105], PLAINTIFF'S REPLY MEMORANDUM OF LAW (May 2001) [RECORD at 150-246], and more recently the PLAINTIFF'S "TRIAL BRIEF" FOLLOWING REMAND FROM THE UTAH SUPREME COURT (October 2006) [RECORD at 503-537].

The claims of B.A.M. are more than adequately identified and preserved. The COUNTY's arguments on that issue are spurious and disingenuous.

V

THE NATURE OF THIS APPEAL---TO REVIEW THE TRIAL COURT'S FAILURE TO CORRECTLY APPLY THE NOLLAN-DOLAN "ROUGH PROPORTIONALITY" STANDARD--- DOES NOT REQUIRE THE "MARSHALLING OF THE EVIDENCE"

Similarly, the COUNTY's assertions concerning the Appellant's claimed "failure to marshal the evidence" from the Record are disingenuous and erroneous. This "appeal" is not framed to have arisen from a narrow evidentiary ruling buried in the Record, or even from a claim that the evidence fails to support the verdict. For the most part, the "evidence" adduced at trial (i.e. 3.04% roadway traffic "impact"; uncompensated required dedication of real estate

and installation of adjacent improvements) is undisputed.[2] B.A.M.'s claims can be adjudicated on appeal essentially without resort to the Record from the trial court. The District Court's "findings" and "conclusions" essentially recite the actual "evidence", essentially correctly.

But those "findings" and "conclusions" themselves---facially so---as written by the COUNTY and as accepted by the District Court materially manifest the District Court's failure to understand and apply the "rough proportionality" standard.

Such is the B.A.M. "appeal" and no "marshalling" should be expected or required.

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[2]The Appellant B.A.M. asserts that the actual "denominator" for the "traffic impact percentage" should not be the 12,000 vehicles per day starting number (thus deriving the 3.04%), but rather should be the 36,000+ vehicles per day as the carrying capacity of the roadway fully improved to the 53-foot "half-width", as B.A.M. was required to dedicate and improve across its 900-foot frontage. Indeed, the mathematical and conceptual accuracy of that methodology is implicitly acknowledged by the COUNTY's attempt---not per se allowed on appeal---to recast and recharacterize the extent of the improvements and roadway right-of-way (and thus its ultimate "carrying capacity") for the roadway "link".

Also note that were this case to be an "impact fees" case (by which the costs of the improved roadway are more equitably spread across-the-board to other developments, which is not the case here), state statute---Section 11-36-102(14)(b), Utah Code---prohibits the use of "state roadways" in the numerical calculations to arrive at the "impact fee" to be charged by local government. Such being the stated legislative policy of the State, the COUNTY is definitely "on thin ice" for the uncompensated, required exaction imposed upon B.A.M.

VI

THE "RIPENESS", "FINALITY" AND "EXHAUSTION OF ADMINISTRATIVE REMEDIES" ARGUMENTS OF THE COUNTY ARE DISINGENUOUS AND INCORRECT

The COUNTY's arguments as to "(lack of) ripeness", "finality" and "exhaustion of administrative remedies" and so forth, as asserted in its Brief, are all generally and specifically disingenuous and incorrect. Those arguments are simply the rehash of earlier arguments, arising from the flawed misunderstanding, conveniently assumed by the COUNTY for self-serving purposes that this case is a "land-use appeal". This case isn't.

This case is a straight-up pleaded litigation for the unconstitutional "takings" and "equal protection" violations, in an "inverse condemnation" action, brought under the "self-executing" provisions of the Utah Constitution (and the corresponding federal provisions, per **Nollan** and **Dolan**). There is and was no requirement for any "notice of claim" to be filed in advance of the litigation, as a condition precedent to the litigation. See **Colman vs State Land Board**, 795 P.2d 622 (Utah 1990). Similarly, there was no requirement for any "administrative hearing". See Section 63-90a-4, Utah Code. Indeed, the Utah Supreme Court essentially ruled on the merits---inferential, implied or

otherwise---of these issues, to the detriment of the COUNTY. The issues ought not be revisited.

Finality and ripeness of the "administrative appeal", "administrative exhaustion of remedies", and so forth are disingenuously advanced, for a number of simple reasons:

1. First and foremost, the COUNTY---in 1998---acting through the Board of County Commissioners, refused to even consider the BAM "administrative appeal". [It wasn't that the COUNTY Board of Commissioners "heard" the appeal and then denied the appeal; the Board refused to even hear it!] Thus, it is disingenuous for the COUNTY to now claim there are "exhaustion of remedies" and related issues precluding judicial review of the pleaded claims.]

2. As far as any "ripeness" question goes, we are here dealing with an actual "physical taking", effected in 1999 pursuant to final action by the COUNTY in finally approving of the development. Even though the litigation had been filed in 1998, the COUNTY had that entire year to rescind its earlier action and has had almost eight years since to rescind its "taking" decision. To say now that the case has "ripeness" features is simply

incorrect and disingenuous.

Plaintiff's claims as to "equal protection" and "uniform operation of laws" have always been and are part-and-parcel of the Plaintiff's case. Those claims have never been abandoned. That the Utah Supreme Court's original "writ of certiorari" review of the original **B.A.M. Development I** (Court of Appeals 2004) decision was narrowly confined to the narrow procedural or substantive questions which the Supreme Court framed for that certiorari review should not be now construed to preclude BAM from making its historic claims. The "equal protection" and "uniform operation" claims---as well as the "state law" claims of "reasonable relationship" [**Call vs West Jordan**, 606 P.2d 217 (Utah Supreme Court 1979), on rehearing 614 P.2d 1259 (Utah Supreme Court 1980)] and "the constitutional standard of reasonableness" (**Banberry Development vs South Jordan City** (1981)]---are essentially the same constitutional basis, albeit framed and approached somewhat differently.

Had the COUNTY recognized and followed **Dolan** from the beginning---administratively---and/or even judicially in the first District Court proceeding (in which the COUNTY advanced spurious arguments and justifications which were unanimously swept aside by all eight appellate judges) we probably wouldn't now be arguing about how broadly or

narrowly the Utah Supreme Court should have decided things on "certiorari" and/or what was preserved within that "appeal".

Similarly, the COUNTY likewise forgets that its administrative staff similarly rejected BAM's offer to not effect the roadway improvements, unless and until UDOT actually required those improvements and was willing to pay for those improvements (at government expense) and would through eminent domain acquire the necessary right-of-way (from the existing pavement) to the so-called 53-foot line. See Testimony of Scott McCleary, RECORD/TRANSCRIPT at pages 35, lines 1 through 18, and Page 42, lines 5-13, in "remand hearing" (October 2006).

Furthermore, any "lack of administrative appeal" arguments (from the COUNTY) must be disregarded for the simple reason that the "highway-abutting" Ordinance essentially mandated the unconstitutional exaction (installation of improvements, regardless of the right-of-way "width" dedication) and the COUNTY could not ignore or disregard the mandatory provisions of its own ordinance.

So for the COUNTY to now "split hairs" on issues of "ripeness", "finality" and/or "exhaustion of administrative remedies" is simply disingenuous and should not be accepted.

As far as B.A.M.'s claimed (by COUNTY) "failure to

object" trial court's "findings" and so forth, the Plaintiff wasn't given an opportunity to "object" or even comment to the District Court's findings and conclusions. The District Court issued its written Memorandum Decision on 27 December; copies thereof were mailed to counsel. Assuming, for sake of argument, that COUNTY's counsel prepared the findings---facially indicating that Lohra Miller was then the District Attorney (which didn't occur until January 2nd), and that a copy thereof was thereafter served upon Plaintiff's counsel (the document itself doesn't even indicate such was actually done)---Plaintiff's counsel would have, theoretically "ten days" in which to respond and comment, and perhaps even object. And because the ten days is "less than eleven days", intervening weekend days are not included, thus extending until January 14th (or even later if service by mail was utilized). But Judge Hansen signed the "findings" on January 11th, a mere 9 days after the earliest possible date those "findings" could have been filed with the Court and served upon counsel.

Given Judge Tim Hanson's seeming urgency and propensity to "get rid of this case" judicially---following his retirement from the bench---any additional effort seeking Judge Hanson's "review" or reconsideration of the "findings" would be an exercise in futility.

As noted above, B.A.M. does not really take issue with the entered "findings", which essentially and accurately reflect what actually happened and, for the most part, the evidence adduced at trial: not necessarily all the evidence, but at least the evidence necessary for the District Court's determination---nevertheless believed to be wrong---of "no cause of action". That the COUNTY chose an illogical method to arrive at that "conclusion" [#5] evidences exactly why and how this appeal is meritorious.

VII

"EQUAL PROTECTION" AND "UNIFORM OPERATION OF LAWS" CLAIMS OF B.A.M. AGAINST THE "HIGHWAY-ABUTTING" ORDINANCE AND THE REQUIRED EXACTIONS THEREUNDER ARE MERITORIOUS AND LIKEWISE INVALIDATE THE COUNTY-REQUIRED EXACTION (OF DEDICATION AND IMPROVEMENT)

As noted earlier, the unconstitutionality---facially and as applied in this case---of the so-called "highway-abutting" Ordinance (whereunder only those parcels abutting the roadway are exacted against, while nearby parcels creating the same "impact" described in terms of vehicles on the roadway are not required to dedicate or improve anything) is readily apparent. The Ordinance and its exactions cannot be justified or defended, even if it is uniformly applied against all "highway-abutting" parcels, while simultaneously leaving untouched "similarly-situated" (the COUNTY's frequently cited terminology, albeit for the

incorrect analytical point) parcels having the same corresponding "impact" (defined in vehicles, not adjacency to the roadway).

In **Malan vs Lewis**, 693 P.2d 661 (Utah Supreme Court 1984), the Utah Supreme Court---invalidating the Utah "automobile guest statute"---illuminated and articulated the purposes and application of the "uniform operation of laws" and the "equal protection" provisions of the constitutions. In **Malan** the Utah Supreme Court stated:

> For a law to be constitutional under Article I, section 24, it is not enough that it be uniform on its face. **What is critical is that the operation of the law be uniform. A law does not operate uniformly if "persons similarly situated are not "treated similarly" or if "persons in different circumstances" are "treated as if their circumstances were the same."**

693 P.2d 661 at 669. Emphasis added.

The dedication and the improvement required from the Plaintiff when the similarly-situated, "side-by-side" developer of "Elusive Meadows" immediately to the south pays nothing is not the "uniform operation" the constitution requires. The "abutting-highway" criterion for the "classification" is a blatant, straight-forward attempt to avoid the constitution requirement of paying for the "taking".

In **State Tax Commission vs Department of Finance**, 576 P.2d 1297 (Utah Supreme Court 1978), the Utah Supreme Court

stated:

> Equal protection protects against discrimination within a class. The legislature has considerable discretion in the designation of classifications but **the court must determine whether such classifications operate equally on all persons similarly situated.**
>
> Thus, whether a classification operates uniformly on all persons situated within constitutional parameters is an issue that must ultimately be decided by the judiciary.

576 P.2d at 1298. Emphasis added.

The Defendant COUNTY would have the Court believe there is no "equal protection" and/or "uniform operation" violation because the "highway-abutting" approach treats all "similarly-situated" propertyowners the same: all "highway-abutting" property owners must effect the required dedications and make the required improvements and all other (i.e. non-"highway-abutting") propertyowners don't have to do anything! It is that simple! The constitutions require that similarly-situated persons (in this case, propertyowners at large) be treated "equally" and "uniformly". Everyone ought to be required to contribute an equitable share to the costs of the roadways which everyone is entitled to use. A single group, regardless of how creatively or carefully defined (i.e. "highway-abutting"), of propertyowners cannot be unconstitutionally coerced to provide 100% of the costs of the roadway improvements, merely by reason of the "coincidence of geography".

In the instant case, there are but two classification groups: those "highway-abutting" parcels forced to bear 100% and those parcels which do not abut a highway (and are thus entitled to pay nothing, even though they may create the exact same impact. The residents of the Elusive Meadows subdivision immediately to the south of Westridge Meadows do not merely hop in their car, drive down Montclair Drive almost to 3500 South, and then turn around and return to their homes, without exiting the subdivisions onto 3500 South. Those "Elusive Meadows" residents do utilize 3500 South, for which they have paid nothing. The situation should not be, for example, wherein Elusive Meadows people pay nothing and the Westridge Meadows pays everything.

CONCLUSION

The COUNTY's "highway-abutting" Ordinance and the "exactions" required thereunder (not merely a real estate dedication but also the installation of adjacent improvements) is a blatant attempt to evade the constitutional requirement of "paying for the change". Those excessive, unconstitutional burdens cannot be imposed upon B.A.M. merely because of the geographic misfortune of being adjacent to a roadway the COUNTY desires to have widened and improved. The "exaction" (dedication and improvements) benefit the public-at-large and are of no specific benefit

to B.A.M.'s residents, except as members of the public-at-large (because of the impassable barrier fencing). Similarly, the exaction is excessive because other improvements were required for the "frontage" of those lots on the "internal street" of the development.

The District Court failed to correctly apply the **Nollan-Dolan** "rough proportionality" standard: the COUNTY's seeming abandonment of its original mathematical and legal justification (ala Conclusion #5), as reflected in the COUNTY-prepared "findings" and "conclusions", and the COUNTY's newly-identified request to adopt an alternative methodology not presented to the District Court confirm the B.A.M. position that the COUNTY (and the District Court) simply have done it wrong. The District Court's "conclusion #5" is clearly erroneous as a "matter of law" as to the application of the "rough proportionality" standard.

The District Court decision must be reversed and the case remanded to the District Court for entry of judgment in favor of B.A.M. for the entirety of its claims: the value of the real estate dedication as well as the direct expenses for the required improvements to the 3500 South roadway.

Respectfully submitted this 31st day of August, 2007.

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Attorney for Appellant
B.A.M. DEVELOPMENT, L.L.C.

CERTIFICATE OF DELIVERY

I certify that I caused two copies of the foregoing APPELLANT'S REPLY BRIEF to be hand-delivered to the office of Mr Donald H Hansen, Deputy Salt Lake County District Attorney, Suite #S-3700 Salt Lake County Government Center, 2001 South State Street, Salt Lake City, Utah 84190-1210, this 31st day of August, 2007.

Stephen G Homer